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In the

Supreme Court of the United States

THE UNIVERSITY OF NORTH CAROLINA AT CHAPEL HILL,
Petitioner,

v.

MELISSA JENNINGS,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

REPLY TO BRIEF IN OPPOSITION

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REPLY TO BRIEF IN OPPOSITION

The new points in the Brief in Opposition do not show that Dorrance's conduct had any concrete, systemic and negative effect on Jennings's educational opportunities; nor do the new points show that UNC had actual notice that Dorrance was illegally discriminating against his players because of their sex. The fact remains that the Fourth Circuit's decision permits Jennings to recover damages under Title IX simply because Dorrance's sexual banter with other players and cursing made her feel bad. Title IX requires plaintiffs to prove more. The Petition squarely presents the questions of whether mere emotional injury – of the type that would permit recovery under 42 U.S.C. § 1983 or Title VII – is enough to prevail on a claim under Title IX and whether a causal conversation with a university administrator about a coach's crude interactions with other players constitutes actual notice that the plaintiff is being discriminated against because of her sex.

I. THE NEW POINTS PRESENTED IN RESPONDENT'S BRIEF IN OPPOSITION DO NOT DEMONSTRATE THAT THE ALLEGED HARASSMENT HAD A CONCRETE, SYSTEMIC, NEGATIVE EFFECT ON PLAINTIFF'S EDUCATIONAL OPPORTUNITIES.

The Petition For Certiorari presents issues unique to the interpretation and application of Title IX of the Education Amendments of 1972, in particular, 20 U.S.C. § 1681(a). This Court has held that, to recover damages on a sexual harassment claim under Title IX, a plaintiff must prove not only that the

harassment caused emotional distress but that the alleged harassment had a concrete, systemic and negative effect on the plaintiff's educational opportunities. *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 652, 654 (1999). UNC does not deny that Jennings has testified that she suffered emotional distress from Dorrance's alleged sexually harassing behavior. (Pet. App. 20a) If this were a case arising under Title VII or 42 U.S.C. § 1983, plaintiff's testimony about her pain and suffering would be enough to permit a jury to return a judgment for her. *Harris v. Forklift Sys.*, 510 U.S. 17, 22 (1993) (Title VII bars conduct that would seriously affect a reasonable person's psychological well-being); *Memphis Cmty. School Dist. v. Stachura*, 477 U.S. 299, 307 (1986) (42 U.S.C. § 1983 permits plaintiffs to recover damages for personal humiliation, mental anguish and suffering, and emotional distress). However, mere emotional injury is not enough to recover damages under Title IX. Instead, before an educational institutional can be exposed to damages under Title IX, a plaintiff must present evidence that, following actual notice of sex discrimination, the institution was deliberately indifferent to continuing sexual discrimination that had a concrete, systemic and negative effect on the plaintiff's educational opportunities.

Jennings concedes that she must present specific evidence that she suffered such a concrete harm. (Br. in Opp'n, p. 12) In holding that Jennings had carried that burden, the Fourth Circuit Court of Appeals cited Jennings's testimony that Dorrance's alleged sexual harassment prevented her from attaining what she believed was her full potential, either in the class room or on the playing field. As UNC demonstrated in its Petition, however, the record shows that Jennings's grades

improved while she was on the soccer team and she testified that she believed she had done well on the team. On this record, Jennings's claim that she did not do as well as she thought she might have if her emotional state were better is entirely speculative. Jennings cannot even show that her grades declined – an objective event that even the majority in *Davis* held was inadequate to show a violation of Title IX. *Davis*, 526 U.S. at 652. Jennings's self serving speculation regarding the effect she thought Dorrance's conduct had on her ability to reach what she consider to be her full academic and athletic potential is clearly not the concrete, systemic and negative effect that the *Davis* Court held was necessary to prevail on a claim for damages under Title IX.

In an attempt to prove that Jennings did suffer a concrete loss of educational opportunity, the Brief in Opposition references two events – Dorrance's decision to cut Jennings from the team in the spring of 1998 and Jennings's decision to withdraw from UNC after she filed the complaint in this case. While those concrete events affected Jennings's educational opportunities at UNC, Jennings did not allege either of those events as consequences of Dorrance's sexual harassment, the Fourth Circuit did not rely upon those events in its opinion, and they are logically irrelevant to the issues presented in the Petition.

A. Dorrance's Decision to Cut Jennings from the Team Is Not Relevant to the Issues Presented in the Petition.

In her amended complaint, Jennings did allege that she was cut from the team in retaliation for charges of sexual

harassment *that others had made on her behalf.* That claim did not survive summary judgment for several reasons: (1) other than Jennings's testimony regarding her conversation with Ehringhaus there was no evidence that anyone made any complaints of sexual harassment on behalf of Jennings or any other player before Dorrance cut Jennings from the team; (2) there was no evidence that Dorrance was aware that Jennings had told Ehringhaus that she was uncomfortable with Dorrance's interactions with other players; and (3) there was no evidence that Dorrance's decision to cut Jennings was based on anything other than Jennings's objectively poor athletic and academic performance. Jennings's attempt to recast Dorrance's decision to cut her from the team as a concrete consequence of his alleged sexual harassment is fundamentally flawed.

Dorrance's decision to cut Jennings from the team is unrelated to Jennings's claims of sexual harassment. This is not a case of constructive discharge; Jennings did not quit the UNC women's soccer team because she could not stand Dorrance's sexual harassment. In fact, in response to UNC's argument that Jennings's desire to remain on the team proved that Dorrance's alleged harassment was neither severe nor pervasive, the Fourth Circuit was constrained to hold that the fact that Jennings was disappointed to be cut from the team did not affirmatively prohibit her from prevailing on her Title IX claim. (Pet. App. 20-21a)

Although it is a concrete event which deprived Jennings of the opportunity to participate on the team, Dorrance's decision to cut Jennings from the team does not satisfy Jennings's obligation to provide evidence that she suffered a concrete deprivation of educational opportunities *as a result of*

UNC's deliberate indifference to alleged sexual harassment.

B. Jennings's Decision to Leave UNC after She Filed the Complaint in this Case Is Irrelevant to the Issues Presented in the Petition.

Jennings's decision to leave UNC after she had been cut from the team and after she had filed the lawsuit is not a concrete consequence of UNC's deliberate indifference to Dorrance's alleged sexual harassment. Although she testified in her deposition that she left UNC after she filed her complaint because harassing telephone calls made her fear for her safety, Jennings never amended or supplemented the complaint to allege those events or to claim that UNC was responsible for the telephone calls.

Jennings's decision to leave UNC did result in a concrete loss of educational opportunities. However, Jennings's decision to leave UNC because third parties harassed her about filing the complaint is not evidence that Jennings suffered a concrete loss of educational opportunities *as a result of UNC's deliberate indifference to Dorrance's alleged sexual harassment.*

II. JENNINGS'S RELIANCE ON UNC'S RESPONSES TO ALLEGATIONS OF SEXUAL HARASSMENT ARE LEGALLY IRRELEVANT TO THE ISSUES BEFORE THE COURT.

After Jennings was cut from the team and after her parents complained that Dorrance had made inappropriate comments to the players on the team, UNC and Dorrance wrote

to Jennings's father and apologized for Dorrance's "inappropriate . . . involvement in (sexual) discussions." (Pet. App. 8a) UNC also issued what the Fourth Circuit characterized as "a mild letter of reprimand" to Dorrance in which it warned him that it was "inappropriate for [Dorrance] to have conversations with members of [the] team (individually or in any size group) regarding their sexual activity." (Pet. App. 9a) The Brief in Opposition notes that as part of a subsequent settlement, UNC and Dorrance issued another letter to Keller which contained an apology similar to the apology it had given to Jennings. (Br. in Opp'n, p. 12)

The Brief in Opposition references this correspondence as evidence that Dorrance's behavior was "undisputedly improper." (Br. In Opp'n, p. 12) In fact, this correspondence is irrelevant to the issues before the Court.

First, the fact that UNC settled with Jennings's co-plaintiff Debbie Keller is totally irrelevant to the merits of Jennings's claims. Keller's complaint raised several claims other than the Title IX claim at issue in this case. Furthermore, the Rules of Evidence prohibit courts from considering settlements as evidence of liability. Fed. R. Evid. 408(a). Therefore, UNC's settlement with Keller is irrelevant to this case.

Second, UNC's decision to issue Dorrance a reprimand is a subsequent remedial measure that is not admissible to prove culpable conduct. Fed. R. Evid. 407.

Finally, rather than advancing her arguments, Jennings's reference to the apologies and reprimand highlights the difference between sexual harassment that violates Title IX and inappropriate conduct which warrants an institutional response.

In order to hold UNC liable under Title IX, Jennings must show that UNC had actual notice of sexual harassment which constitutes illegal sexual discrimination. *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 292-93 (1998). On the other hand, UNC has an interest in its coaches and faculty setting examples for students and in creating and maintaining an educational environment that meets high standards for civil discourse and conduct. The fact that UNC determined that Dorrance's conduct fell short of its high standards for coaches and faculty does not mean that UNC believed that Dorrance's conduct was illegal or that its failure to take action earlier constituted deliberate indifference to illegal sexual discrimination of Jennings or any other player.

Federal anti-discrimination statutes are not "general civility code[s]." *Faragher v. Boca Raton*, 524 U.S. 775, 787 (1998). The law does not require coaches and faculty to limit their speech and personal interactions to standards that would be accepted in the most polite societies. However, when UNC exercises its authority to hold its coaches to a higher standard of conduct, it should not have to fear that its decisions will subsequently compromise its legal position.

In this case, UNC decided that Dorrance had violated its standards of conduct for coaches. In light of that decision, UNC deemed it appropriate to apologize to Mr. Jennings and Ms. Keller and to reprimand Dorrance. That is not evidence that UNC determined that Dorrance illegally discriminated against Jennings or any other player because of her sex. More important to the present issue, it is not evidence that UNC agreed that the conduct Jennings allegedly described in her conversation with the UNC General Counsel Susan Ehringhaus constituted actual notice that Dorrance was sexually harassing

players because of their sex in violation of their rights under Title IX.

III. THE FOURTH CIRCUIT'S DECISION IN THIS CASE IS IN CONFLICT WITH THE SEVENTH CIRCUIT.

In *Gabrielle M. v. Park Forest-Chicago Heights, Ill. Sch. Dist. 163*, 315 F.3d 817 (7th Cir. 2003), the Seventh Circuit found that despite evidence that the plaintiff had suffered significant psychological injury from sexual harassment, including bed-wetting, insomnia, nightmares, and loss of appetite, her grades remained steady and her absenteeism from school did not increase. *Id.* at 823. Therefore, the Seventh Circuit held that there was no evidence plaintiff had been denied concrete educational opportunities in violation of her rights under Title IX. *Id.* The Seventh Circuit decision conflicts with the Fourth Circuit's holding that Jennings's alleged psychological injury was sufficient in and of itself to make out a claim for damages under Title IX even though the record shows that her grades improved and she continued to fully participate on the soccer team. Jennings attempts to avoid the conflict by reference to irrelevant distinctions between this case and *Gabrielle M.*

The fact that *Gabrielle M.* involved alleged student-on-student sexual harassment is irrelevant. Teacher-on-student sexual harassment may be more likely to violate Title IX because such conduct is more likely to result in a concrete, systemic and negative effect on educational opportunities. *Davis*, 526 U.S. at 653. But, the mere fact that Jennings has alleged that she was sexually harassed by a coach does not absolve her of the obligation to present evidence that the

coach's conduct deprived her of concrete educational opportunities.

The fact that the school in *Gabrielle M.* immediately responded to the student's parents' complaints is also irrelevant to the issues raised in the Petition. Proof that the institution was deliberately indifferent to actual knowledge of sexual harassment is an essential element of a Title IX sexual harassment claim. *Gebser*, 524 U.S. at 277. However, an institution that is deliberately indifferent to actual notice of sexual harassment is only liable for any subsequent illegal harassment that had a concrete, systemic and negative impact on the plaintiff's educational opportunities. The Seventh Circuit relied upon the absence of such proof to rule in favor of the defendants. The Fourth Circuit decision that Jennings could proceed with her claims despite the absence of such evidence places it in direct conflict with the Seventh Circuit.

CONCLUSION

The Court should grant the Petition.

Respectfully submitted,

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